

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING  
EN BANC**





77-1140

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA,

Appellee,

-against-

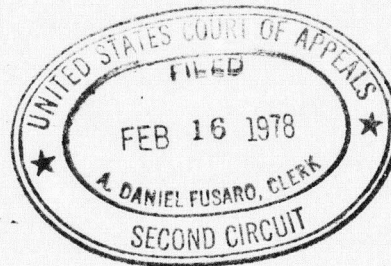
DAVID STIRLING, JR., WILLIAM G.  
STIRLING, HAROLD M. YANOWITCH,  
EDWIN J. SCHULZ and RUBEL L.  
PHILLIPS,

Defendants-Appellants.  
-----X

B  
P/S

Docket No. 77-1140

PETITION FOR REHEARING AND REHEARING  
IN BANC ON BEHALF OF DEFENDANTS-APPEL-  
LANTS DAVID STIRLING, JR., WILLIAM G.  
STIRLING AND HAROLD M. YANOWITCH



ORIGINAL



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, : Docket No. 77-1140  
Appellee, :  
-against- :  
DAVID STIRLING, JR., WILLIAM G. :  
STIRLING, HAROLD M. YANOWITCH, :  
EDWIN J. SCHULZ and RUBEL L. :  
PHILLIPS, :  
Defendants-Appellants. :

-----x  
PETITION FOR REHEARING AND REHEARING  
IN BANC ON BEHALF OF DEFENDANTS-APPEL-  
LANTS DAVID STIRLING, JR., WILLIAM G.  
STIRLING AND HAROLD M. YANOWITCH

Defendants-Appellants David Stirling, Jr., William G. Stirling and Harold M. Yanowitch respectfully petition the Court, pursuant to FRAP 35 and 40, for a rehearing or, alternatively, a rehearing in banc of the decision of this Court (Lumbard, Oakes, Meskill, JJ.) dated February 2, 1978. The decision affirmed defendants' convictions for securities fraud, mail fraud and conspiracy in connection with the sale of stock in Stirling Homex Corporation ("Homex").

Summary

Petitioners submit that the Opinion ("Op.") of this Court misapprehended certain arguments raised on this appeal



which, if fully considered, would have resulted in the vacatur of their convictions and the granting of a new trial.

First, petitioners submit that the Court misconstrued the impact of the Government's use of the guilty and nolo contendere pleas entered by David Stirling and Harold Yanowitch to a Western District of New York indictment charging violations of the Taft-Hartley Act (U.S. v. David Stirling, Jr. and Harold M. Yanowitch, 74 Cr. 318). These pleas were permitted to be withdrawn by order of Senior District Judge Harold P. Burke because of the Government's wrongful suppression of exculpatory material in the Western District proceeding. As noted by petitioners in their motion to remand (referred to at Op., p. vii, fn. 15), the pleas and convictions, while not referred to as such at the trial below, were effectively used as an involuntary confession on the issue of whether petitioners "bought off" officers of the United Brotherhood of Carpenters and Joiners of America ("UBCJA").

Second, petitioners submit that the Court grossly understates and perhaps misapprehends the significance of the trial court's exclusion of defense witness Peter Turzik, a former UBCJA official, whose testimony would have allowed the jury to find that the Government's star rebuttal witness, Theodore Kheel, was simply lying. The primary basis for this Court's ruling -- that Turzik's testimony would have been cumulative of the testimony of a non-UBCJA official, Joseph Lane Kirkland (Op., p. 49) -- is effectively negated by the Government's summation, which unfairly emphasized the fact that Kirkland was not a UBCJA official.



POINT I

THE GOVERNMENT'S USE OF THE PLEAS TO THE  
WESTERN DISTRICT INDICTMENT IMPROPERLY  
DEPRIVED PETITIONERS OF A FAIR TRIAL

On cross-examination, David Stirling was forced to concede that, on January 21, 1976, he had admitted "having delivered things of value or caused the delivery of things of value" to UBCJA officials Ruggiano, Marsh and Jacobs (Tr. 4183-87). The basis of this admission -- which was drawn out by a question of the Court itself (Tr. 4183) -- was Stirling's guilty plea to the Western District indictment (Government Exhibit 577). Similarly, by reason of the trial court's ruling that Yanowitch's nolo contendere plea could be used against him if he testified with respect to the UBCJA, Yanowitch was intimidated into silence despite the Government's previous introduction of "at least ten witnesses who testified to one or another of the labor stock transactions" (Government Brief, p. 88; Tr. 2885-88, 4639). Additionally, since David Stirling's admissions were used against his brother William (see, e.g., Government Brief, pp. 94-95), he, too, was prejudiced by the trial court's ruling on the use of the Western District pleas.

Of course, before making these rulings, the trial court had been advised that these admissions were unconstitutionally obtained in violation of Brady v. Maryland, 373 U.S. 83 (1963). See Tr. 20-21, 3350-3351; Yanowitch Exhibit "AAA" (motion to vacate Western District pleas). The trial court also knew, from the testimony adduced from both the Government's witnesses



and Stirling's cross-examination, that aside from the Western District pleas there was no evidence to indicate that Stirling's loan re-payment agreement with Shea had any connection with loans made by Central Trust to UBCJA officials. See Tr. 4182-83; see also Tr. 2126-27, 2135-36 (Marshall). Nevertheless, the trial court permitted the Government to use the guilty pleas against petitioners to resolve this critical issue against them.

In rejecting petitioners' claim that these rulings deprived them of a fair trial, this Court simply held that:

"Neither the pleas nor the convictions entered in the Western District were admitted as evidence in the Southern District. Appellants now request that we dismiss this appeal without prejudice and remand it to the Southern District pending disposition of their contemplated motion. We deny the appellants' motion. See Fed. R. Crim. P. 33; United States v. DeSapio, 456 F.2d 644, 647 (2d Cir.), cert. denied, 406 U.S. 933 (1972); United States v. Sposato, 446 F.2d 779, 781 (2d Cir. 1971)."

--Opinion at vii, n. 15.

We respectfully submit that this Court's analysis of the issue, by focusing upon merely the form which the admission took, does not meet the substance of petitioners' argument -- that the Government was not entitled to any use of statements extorted in violation of the Brady doctrine, and that the particular use made in this case was sufficiently prejudicial as to warrant a new trial.

To begin with, there is a serious question as to whether a reasonably sophisticated juror would not have realized that Stirling's admission, five years after the event, that he had



"caused Mr. Shea to deliver a thing of value" was a guilty plea to a criminal charge, especially when the prosecutor had handed the witness a copy of the transcript of the Western District allocution and asked him to examine it (Tr. 4186-87).

Furthermore, even if no juror had perceived that the Government's reference was to a guilty plea, the Court's opinion does not consider whether the admission of incriminating statements secured by Government misconduct can be so quickly dismissed because the Government did not directly advert to either the plea or the conviction. In United States v. Fox, 403 F.2d 97 (2d Cir. 1968), this Court held that inculpatory statements on collateral matters, when secured without the benefit of a complete Miranda warning, were such an invasion of a defendant's constitutional rights as to warrant a new trial. If the Court can reach that result in a case where the defendant's rights were violated by a harried FBI agent's failure to mention the availability of assigned counsel, how can it be claimed that the United States Attorney's studied failure to deliver exculpatory material is excusable?

Indeed, the particular circumstances surrounding the Western District admissions raises a serious issue as to the bona fides of the Government's use of those admissions at trial. The sentences imposed for the Taft-Hartley violations were minimal: for David Stirling, a three-month suspended sentence, a three-month probation, and a \$5,000 fine, and, for Yanowitch, a \$1,000 fine (A74-75). However, six months after those pleas were taken,



petitioners were indicted on much more serious charges which, in large part, were centered around those pleas. In effect, the Government had parlayed a traffic ticket into a murder case, where they would not have even received a guilty plea to the traffic violation had they provided defendants with the exculpatory material required by Brady v. Maryland, supra.

Finally, from the Court's citations to United States v. DeSapio, 456 F.2d 644, 647 (2d Cir.), cert. denied 406 U.S. 933 (1972) and United States v. Sposato, 446 F.2d 779, 781 (2d Cir. 1971), it would appear that the Court has adopted the standard of prejudice applicable to a motion based on newly discovered evidence, has weighed petitioners' claims against that standard, and found those claims wanting. We respectfully submit that the Court has applied the wrong standard, and, by not remanding the issue to the district court, has assumed a task better left to the trial judge who heard the evidence.

Both the DeSapio and Sposato decisions involved newly discovered evidence which could have been used to impeach key Government witnesses, and neither dealt with the use of a confession obtained by Government misconduct. Indeed, in the Sposato decision itself, this Court carefully distinguished between the standard applicable to "new evidence" -- "such as would probably produce an acquittal" -- and the standard applicable to prosecutorial misconduct -- "A significant possibility that the

undisclosed evidence might have led to an acquittal or a hung jury", citing United States v. Miller, 411 F.2d 825, 831 (2d Cir. 1969). See 446 F.2d at 781. See also United States v. Polisi, 416 F.2d 573, 578 (2d Cir. 1969). Moreover, those decisions which have considered Brady violations, a distinctive form of misconduct, have indicated that the evaluation of the prejudice to defendants must also be weighed in terms of the preparation and presentation of the case for the defense, as well as the impact of the testimony itself. See, e.g., Grant v. Alldredge, 498 F.2d 876 (2d Cir. 1974).

Moreover, the Court's opinion fails to consider the standard applicable to an involuntary confession. On that particular question, which is not answered by the Court's citation to the DeSapio or Sposato decisions, the Supreme Court has already spoken in Jackson v. Denno, 378 U.S. 368, 376 (1964):

"It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, Rogers v. Richmond, 365 U.S. 534, and even though there is ample evidence aside from the confession to support the conviction." (Emphasis added)

Finally, if either these or any other standards are to be applied to the Western District admission, such application should be left to the trial court, which heard the testimony, rather than this Court, which only has a cold record before it.



Petitioners submit that David Stirling's admissions regarding the Shea transaction were the turning point in this case, where the Government played its trump card to its maximum advantage. The proper evaluation of its effect, which will necessarily be based upon the effectiveness of Stirling's testimony and the other witnesses introduced by the Government on the UBCJA transaction, can only be made by the trial court.

## II

### THE EXCLUSION OF DEFENSE WITNESS TURZIK DEPRIVED PETITIONERS OF A FAIR TRIAL AND WAS AN ABUSE OF DISCRETION

The single most important witness against the petitioners was Theodore Kheel, a Homex director and its advisor on all matters relating to its labor relations. Kheel did not testify during the Government's direct case, but, after David Stirling had testified that Kheel had told him that there was nothing illegal about UBCJA officials becoming Homex stockholders -- and that Kheel himself had arranged for such official's purchase of Homex stock -- the Government decided to call Kheel in rebuttal (Tr. 4144-45 [A 451-53]). On his direct examination, Kheel testified that he had never discussed such a question with Stirling, and, while he had arranged for prominent labor officials to obtain Homex stock, had certainly never arranged for any UBCJA official to become a Homex stockholder (Tr. 5375-77 [A 479-482]).



Kheel's testimony was diametrically opposed to petitioners' claim that they had relied upon the advice of highly experienced experts on the very matters charged in the indictment. The testimony of Peter Turzik would have demonstrated that Kheel was not the innocent babe-in-the-woods he pretended to be, since Turzik was to have testified that, while he was a UBCJA official, Kheel himself had arranged for Turzik's purchase of Homex stock (Tr. 5453 [A 494]). To lay a foundation for this testimony, Kheel was briefly cross-examined about having arranged Turzik's purchase of Homex stock -- which he flatly denied (Tr. 5395 [A 488]) -- and some equivocal grand jury testimony which again ended up with Kheel's denial of any involvement in Turzik's purchase (Tr. 5396-97).

However, the jury never heard Turzik's testimony, because the trial court would not permit him to take the stand (Tr. 5493 [A 494]). In upholding this ruling, this Court held that:

"Appellants had a reasonable chance to challenge Kheel's testimony regarding Turzik by confronting him with seemingly contradictory grand jury testimony. In addition, the district court at the same time allowed Joseph Kirkland, one of the labor officials who purchased Homex stock, to testify in rebuttal to much the same effect that Turzik would have. Further evidence would have been cumulative. We can hardly say that the district court abused its discretion in this regard. See Fed. R. Evid. 403. Nor can we say that the district court's decision operated to appellants' substantial prejudice."

-- Op. at 49



Petitioners' respectfully submit that this analysis underestimates the importance of challenging star witness Kheel, and overstates the effect of Kheel's grand jury testimony and Kirkland's testimony.

To begin with, even the Government conceded that the three questions and answers taken from Kheel's grand jury testimony were ineffectual. Thus, in its brief the Government stated that this material "proved only that Kheel then had no recollection, although he acknowledged. . . the possibility that he and Turzik may have once discussed the latter's purchasing stock through Pressprich at the \$16.50 original underwriting price, 'but there is no possibility that I talked to him in March about buying stock at \$30 a share.'" (Government Brief, p. 49) This Court's reference to "seemingly contradictory grand jury testimony" is, we submit, far too charitable.

Moreover, as indicated by Government's own cross-examination of Kirkland and its summation, the testimony of Kirkland was not "to much the same effect that Turzik would have." The disputed point in Kheel's testimony was not whether he had put union officials into Homex -- he admitted that he had -- but whether he, as the author of the "Labor Relations" section of the Homex prospectus, had brought UBCJA officials in as stockholders (Tr. 5400-01). In the Government's two-question cross-examination of Kirkland, the only point it sought to establish was that Kirkland was not a UBCJA official and had nothing to do with Homex's labor relations (Tr. 5485 [A 500]). Likewise,



in its summation, the Government focused exclusively upon that fact:

" . . . Seven men are named in this indictment, seven men who are members of the carpenters union, a union who had worked negotiating contracts, contract disputes or possible disputes with the Stirling Homex Corporation. Those are the men whose stock interest in the company, if obtained by these means, ought to have been somehow disclosed to the investor if it was -- if he was to have a fair reading of what the true labor relations of the company were.

"The Seafarers International, International Association of Machinists, AFL-CIO, executive officers who had no such arm's length contractual dealings, are not in the indictment where the grand jury has charged, and if Mr. Gaynor stands up here and starts looking at you in the eye and starts talking about Lane Kirkland, make sure he answers the question, Lane Kirkland is not in the indictment. Lane Kirkland is No. 8. It is the seven people who are improperly withheld from the investment [sic]."

-- Tr. 5575-76 [A 552-53].

The effect of this argument upon the jury would have been nil had they heard that an eighth UBCJA official had been put into Homex by the star prosecution witness who wrote the "Labor Relations" section of the Homex prospectus.

In sum, Turzik's exclusion allowed the Government to protect its pet theory that Kheel and his co-experts were duped by petitioners into believing that all was well at Homex. The introduction of Turzik's testimony would have permitted the jury to find that Kheel was not simply the victim of a poor memory, or wrong about collateral issues such as Kirkland, but deliberately misstating the very points where he disagreed with David Stirling's testimony.



We must recognize, of course, that the trial court is vested with broad discretion as to the introduction of cumulative evidence and undue delay. However, there was nothing cumulative about Turzik's testimony, nor any claim that he could not have been on and off the stand in five minutes or less. Given the central importance of Kheel's testimony to the Government's case, the trial court's exclusion of Turzik was highly prejudicial to petitioners' defense.

#### CONCLUSION

Defendants-Appellants' motion for a rehearing or, alternatively, a rehearing in banc, should be granted.

Respectfully submitted,

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